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CHARLES ELMORE CR

No. 81

# In the Supreme Court of the United States

OCTOBER TERM, 1932

THE ALTON RAILROAD COMPANY, APPELLANT

*v.*

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, BALTIMORE & OHIO RAILROAD COMPANY ET AL.

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS*

**BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION**

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**BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION**

## OPINIONS BELOW

The opinion of the District Court (R. 177) is reported at 58 F. (2d) 399. The original report of the Commission, Division 5 (R. 22), is reported at 169 I. C. C. 594. The report of the Commission on rehearing (R. 41) is reported at 179 I. C. C. 517.

## QUESTIONS PRESENTED

1. Whether the Commission's negative order, merely denying the affirmative relief sought by ap-

pellant in respect of the divisions of certain joint rates, was one which the District Court had jurisdiction to review.

2. Whether, if the District Court had jurisdiction, appellant's petition should be dismissed for want of equity.

## STATUTE INVOLVED

The Interstate Commerce Act provides:

> SECTION 1 (4). *Duty to furnish transportation and establish through routes; division of joint rates.*—It shall be the duty of every common carrier subject to this Act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers subject to this Act participating therein which shall not unduly prefer or prejudice any of such participating carriers.
>
> SECTION 15 (6). *Commission to establish just divisions of joint rates, fares, or charges; adjustments.*—Whenever, after full hearing

upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used

in the service of transportation, and the importance to the public of the transportation services of such carriers and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge. (C. 91, 41 Stat. 456, 475, 486, U. S. Code, title 49, sec. 1 (4) and sec. 15 (6).)

## STATEMENT

This in an appeal from a final decree (R. 184) of the specially constituted District Court dismissing, for want of jurisdiction, the petition of the appellant which alleged that it was brought "for the purpose of enjoining, setting aside, annulling, and suspending part of a certain order" (R. 1) of the Interstate Commerce Commission, but which actually did not seek to set aside any part of the order, and in substance merely asked the court to grant the administrative relief which the Commission had denied.

### Proceedings before the Commission

The proceeding before the Commission was initiated by the filing of a complaint by the receivers of the Chicago & Alton Railroad Company (R. 13) which alleged that the divisions accorded to them

by the eastern carriers out of the joint proportional or reshipping (transit) rates and out of the joint nontransit rates on grain, grain products, and grain by-products from Peoria and Pekin, Ill., to points in New England and in Eastern Trunk Line territory (east of Buffalo, Pittsburgh, and Wheeling), on traffic over the Chicago & Alton from Peoria and Pekin and interchanged with the eastern carriers at Chicago, Joliet, or Dwight, Ill., were unjust, unreasonable, inequitable, and unduly prejudicial to complainants, in violation of section 1 (4) of the Interstate Commerce Act. It was also alleged that these divisions were in violation of section 208 (b) of Transportation Act, 1920, on the ground that they constituted changes in the divisions which were in effect February 29, 1920, made by the eastern carriers without agreement with the Alton, over its protest, and without requirement by any state or Federal authority. The prayers were for reasonable and just divisions of said joint rates and for reparation.

Hearing was held upon the complaint, at which a large volume of evidence was introduced, including many documentary exhibits. Subsequently, rehearing was held and additional evidence taken. The evidence established the facts hereinafter stated and found by the Commission.

During the interval between the first and second hearings the appellant, Alton Railroad Company,

was formed and acquired the properties of the Chicago & Alton at a foreclosure sale, the receivers being discharged (R. 153, 173), and thereafter the Baltimore & Ohio Railroad Company acquired control of the Alton Railroad Company by purchase of capital stock (R. 42, 173). Both of these acquisitions were approved by the Commission in *Alton R. Co. Acquisition and Stock Issue,* 175 I. C. C. 301. Hereinafter the Chicago & Alton, the receivers thereof, and the Alton Railroad Co. will be referred to as the Alton.

The distance between Peoria and Pekin is less than 10 miles, and the inbound and outbound rates to and from these points and the transit regulations and practices in effect there are generally the same. (R. 24.) Peoria will therefore be referred to as embracing both Peoria and Pekin.

The reshipping or proportional rates from Peoria are actually "transit" rates, applying only where there has been a previous rail movement into Peoria from certain defined territories of origin, where the billing covering the inbound movement into Peoria is surrendered at the time of the outbound movement, where the outbound movement takes place within twelve months after the inbound movement, and where various rules and regulations governing the transit privilege at Peoria, published and filed with the Commission, are otherwise complied with. (R. 24, 28, 45–46, 86, 88.) If the outbound rate is changed during the transit period of

twelve months, the outbound rate in effect at the time of the inbound movement is the lawfully applicable rate. (R. 46.) The outbound shipments from Peoria which move on the transit rates are of commodities agreed to be the same as, or the products of, or the by-products from, some prior shipment which has moved into Peoria. (R. 24.)

The nontransit rates from Peoria apply on shipments which originate locally at Peoria and also on shipments which originated beyond but which are not entitled to the transit rates. (R. 24, 31, 46, 88.)

Most of the outbound traffic from Peoria here involved consists of grain products or commodities taking grain-products rates. The rates on grain products will be referred to herein as typical; New York, N. Y., will be referred to as a typical destination, and all rates and divisions will be stated in amounts per 100 pounds.

The nontransit rates are constructed by adding a specific or arbitrary amount to the Chicago reshipping rate. (R. 32.) The reshipping rate from Chicago to New York, N. Y., on grain products is 30.5 cents. (R. 88.) The specific or arbitrary is 11.5 cents, resulting in a rate of 42 cents (nontransit) from Peoria to New York. (R. 32.)

The nontransit rates were divided as between the Alton, on the one hand, and the eastern lines on the other, when the traffic moved through the aforesaid northern junctions, that is, over the Alton from Peoria to Chicago, Joliet, or Dwight, and

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thence over some eastern line or lines to destination, as follows: 20 per cent of the rate to the Alton and the balance to the eastern lines. (R. 31.) Under this basis of divisions the Alton received 8.4 cents out of the typical rate of 42 cents on grain products from Chicago to New York, and the eastern lines received the balance of 33.6 cents. (R. 176.)

The Commission, Division 5, in its report of November 28, 1930, found that this basis of divisions was unreasonable and that the nontransit rates should be divided by allowing the Alton a division equal to the arbitrary or specific from Peoria to Chicago, with the balance, equal to the reshipping rate from Chicago to destination, to the lines east of Chicago. (R. 33.) This had the effect of increasing the Alton's division of the aforesaid 42-cent rate from 8.4 cents to 11.5 cents and reducing the division of the eastern lines from 33.6 cents to 30.5 cents. (R. 176.)

Upon rehearing, the eastern lines did not challenge this finding of Division 5, and the Commission affirmed it. (R. 42, 48.)

The transit rates from Peoria, which are substantially lower than the nontransit rates, are what are known as "varying proportional" rates; that is, from Peoria to a given destination in the eastern territory any one of four different rates might apply, depending upon the point of origin of the inbound shipment to Peoria. The transit

rates on grain products from Peoria to New York are as follows:

| On shipments originating in— | Rate |
|---|---|
| Illinois-Iowa territory | 32.5 |
| Northern Iowa territory | 31.0 |
| Northwestern territory | 30.5 |
| Trans-Mississippi territory | 32.5 |

(These territories are described below.[1])

These rates were not prescribed by the Commission, nor were the nontransit rates in question, but were voluntarily established by the carriers themselves. (R. 33.)

With the exception of certain points in Illinois, the carriers do not maintain single-factor joint rates from the western grain-producing regions to the eastern destination territory and the traffic moves at through rates made by combining inbound and outbound rates to and from the several gateways, particularly Chicago, Peoria, and St. Louis. (R. 25, 48.) The through rates through the several gateways are equalized, but the factors making up the through rates are not equal. From Trans-Mississippi and Illinois-Iowa territories the

[1] Illinois-Iowa territory embraces the State of Illinois and points on the west bank of the Mississippi River opposite Illinois. Northern Iowa territory embraces that part of the State of Iowa that lies north of the Chicago-Council Bluffs line of the Chicago & North Western Ry. Co. Northwestern territory embraces North Dakota, South Dakota, Minnesota, the western portion of Wisconsin, certain portions of Canada, and Washington, Oregon, and Idaho. Trans-Mississippi River territory embraces all the territory west of the Mississippi River not included in the other three territories, except California, Arizona, and Nevada. (R. 87, 90; Ex. 14, map.)

inbound rates to Peoria are 2 cents lower than to Chicago and correspondingly the outbound rates from Peoria, on traffic originating in those territories, are 2 cents higher than the outbound rates from Chicago. From Northern Iowa territory this difference as between the inbound and outbound rates to and from Chicago and Peoria, respectively, is 0.5 cent, while from Northwestern territory the respective inbound and outbound rates are the same.

There are numerous carriers whose lines reach and serve the western-producing regions and which run directly to Chicago. When the eastern lines receive the traffic from any of these direct carriers, they collect and retain their reshipping or proportional rate applicable from Chicago to destination. This rate does not vary dependent upon the territory of origin. The reshipping or proportional rate from Chicago to New York on grain products is 30.5 cents upon traffic originating in any of the four origin territories. The line of the Alton extends from the Peoria gateway to the Chicago gateway. It follows that if the eastern lines should accord the Alton a division of the rate from Peoria to destination via Chicago greater than the difference between the rates from Chicago and Peoria to destination, the eastern lines would be forced to accept less than their Chicago reshipping rate when the traffic is received by them from the Alton, although they do receive the full amount of that rate when the traffic comes to them from any

other western carrier. The eastern lines were unwilling thus to shrink their revenues in order to enable the Alton to participate in the traffic via this particular gateway,[2] and consequently the Alton was forced to accept as its divisions of the Peoria varying proportional rates the amount, if any, by which those rates exceeded the Chicago proportional rates, viz, 2 cents on traffic originating in Illinois-Iowa and Trans-Mississippi territories, .5 cents on traffic originating in Northern Iowa territory, and nothing on traffic originating in Northwestern territory.

Division 5 of the Commission found these divisions unreasonable and ordered them increased so that the Alton would receive 20 per cent of the rate. (R. 31.) This increased the Alton's divisions of the typical Peoria-New York grain-products rates to amounts ranging from 6.1 cents to 6.5 cents and reduced the divisions of the eastern carriers from 30.5 cents to amounts ranging from 24.4 cents to 26 cents.

Upon rehearing and after full consideration of all the facts, including evidence respecting the matters required to be considered by section 15 (6) of the Act, the Commission reversed this finding of Division 5, and concluded that the Alton was not entitled to increased divisions of these rates.

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[2] What is said herein respecting Chicago is also true of Joliet and Dwight. They are "Chicago rate points," taking the same inbound and outbound rates as Chicago.

In its report on rehearing the Commission, after stating the claim of the eastern lines that they are entitled to retain their 30.5-cent proportional rate east of Chicago, whether the traffic comes from connections after receiving transit at Chicago or any point intermediate thereto or in through continuous movement, pointed out that—

> The line-haul revenue which accrues to the western lines is now the same in all instances, and the Alton does not question the division of the through revenue east and west of Chicago on traffic accorded transit at that point, or on traffic in through continuous movement and which is not stopped for transit. It would thus make a distinction between the shipments accorded transit at Peoria and the other two classes of shipments. On the continuous movement, or on shipments accorded transit at Chicago, it would accord to the eastern lines their full proportional rate beyond Chicago, but on shipments accorded transit at Peoria it would divide the reshipping rate beyond Peoria so as to accord to the eastern lines less revenue and to the western lines greater revenue than they receive on the other two classes of shipments. (R. 44)

The Commission found that to accord a division to the Alton or any other line hauling the traffic from Peoria to Chicago greater than the difference between the rates to and from Peoria and Chicago would result in according to the Alton or other carrier west of Chicago a greater proportion of

the revenue than such carriers now receive on the direct movement to Chicago:

> Since the difference between the inbound rates and the outbound rates from and to Peoria on the one hand and Chicago on the other is in each instance the same, as it must be if the present equalization is to be maintained, to accord a division to the line handling the traffic from Peoria to Chicago greater than the difference between the rates to or from Peoria and Chicago would result, as previously indicated, in according to the carriers west of Chicago a greater proportion of the revenue on the through movement from point of initial shipment to final destination than such carriers now receive from the direct movement to Chicago. In other words, the Alton would receive greater revenue on a shipment from Kansas City, for example, to Chicago accorded transit at Peoria than it would on a like shipment moved direct to Chicago. Also the lines east of Chicago would then be forced to accept less revenue on a shipment accorded transit at Peoria than on a shipment originating at the same point and accorded transit at Chicago or any intermediate point other than Peoria west of Chicago. The transportation services performed by defendants east of Chicago on all of such shipments are the same, and this record refers to no transportation reason for requiring defendants to accept less or different revenue on one than on the other. (R. 47)

The eastern line defendants contended that the participation of the Alton in much of this traffic, particularly from the Northwest, coming to it at Peoria short hauls all carriers handling the inbound traffic to that point, except the Minneapolis & St. Louis, which is the only carrier serving Peoria and the Northwest which does not also serve Chicago, that the Alton is not necessary to the movement of any of this traffic, but that if it desires to continue therein and is not satisfied with its present earnings it should look to the inbound carriers to Peoria and not the carriers east of Chicago. In sustaining this contention the Commission said:

> Neither does the record disclose any substantial differences in the line-haul services of the western carriers, including the Alton, on any of this traffic, but if there were such differences and those differences should warrant greater revenue to the Alton on shipments accorded transit at Peoria than it is now receiving, such increase in revenue to it, it would seem, should come from the portion of the through rate accruing to the western lines and not from the portion now retained by the lines east of Chicago. (R. 47)

In finding that the transportation services of the Alton for the performance of which it sought increased divisions were not of importance to the public, the Commission stated:

> On most of the traffic here considered the route employed by the Alton is circuitous.

The proportional rates from Peoria apply in connection with the Alton, not only via Chicago, Joliet, and Dwight, but also via junctions south of Dwight, such as Chenoa, Ill., to which the haul of the Alton is considerably shorter than to Dwight, and it is not necessary for this traffic after it reaches the Alton to move via its northern junctions. All of this traffic may now move through Ashland and Springfield, Ill., in connection with the Baltimore & Ohio. Prior to the present rate equalization through the various gateways, by rates breaking thereon, the joint rates then in effect from the Northwest to eastern destinations did not apply via Peoria on traffic through Chicago. On grain and by-products from the Northwest the proportional rates from Peoria are now restricted so as not to apply via Chicago, and the same restriction could readily be made on grain products. These facts are important in our consideration of "the importance to the public of the transportation services" of the Alton for the performance of which it is here seeking increased divisions, an element which section 15 (6) of the act requires us to consider. No shipper or community has expressed any concern over the continuance of those transportation services by the Alton, and this record affords no support for a finding that they are important to the public.

The other matters which section 15 (6) requires us to consider in our determination of

> divisions of joint rates, facts with respect to which are of record and which we have considered in reaching our conclusions herein, are sufficiently recited in the original report. (R. 47–48)

Its ultimate findings were:

> We find that the assailed divisions of the reshipping or proportional rates have not been shown to be unjust, unreasonable, or otherwise unlawful as alleged, and the finding in the original report in that respect is reversed. The finding of division 5 in respect of the assailed divisions of the nontransit or local rates is affirmed. A modified order will issue. (R. 48)

The Commission did not disturb the earlier finding of Division 5 that the Commission has "no authority to enforce agreements respecting divisions or to enforce the requirements of section 208 (b) of the Transportation Act, 1920, * * *." (R. 33.) Nor did it disturb Division 5's denial of reparation to the Alton on the ground that it had no authority "to require a readjustment of the divisions of transit, or proportional, rates or of nontransit, or local, rates on the commodities; for there is no showing that any of these rates, from Peoria and Pekin to eastern destinations, were established pursuant to a finding or order of the Commission under section 15 (1) or (3). *Brimstone R. R. Co.* v. *United States,* 276 U. S. 104." (R. 33.)

The order of Division 5, issued November 28, 1930, which granted increased divisions to the Alton out of both the transit and nontransit rates, was by its terms effective March 10, 1931. Prior to its effective date the defendants petitioned the Commission for rehearing. By order dated March 9, 1931, the Commission granted that petition and indefinitely postponed the effective date of Division 5's order. That order never became effective.

The Commission's order of December 7, 1931 [3]

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[3] The body of the order (R. 55–56) reads as follows:

"This case having been reheard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report on rehearing containing its findings of fact and conclusions thereon, which said report, together with the original report and order herein, 169 I. C. C. 594, is hereby referred to and made a part hereof; and the commission having found in said report on rehearing, (1) that just, reasonable, and equitable divisions to be received, respectively, by complainants herein and the defendant carriers east of Chicago, Joliet, or Dwight, Ill., out of the joint nontransit rates on grain, grain products, and grain by-products, in carloads, from Peoria and Pekin, Ill., via Chicago, Joliet, or Dwight, to destinations in eastern trunk-line and New England territories, east of Buffalo, N. Y., over the lines of complainants to Chicago, Joliet, or Dwight, will be the specific or arbitrary over the Chicago reshipping rate to complainants and the reshipping rate from Chicago to destination to the carriers defendant east of Chicago; and (2) that the present divisions of joint reshipping or proportional rates on grain, grain products, and grain by-products, in carloads, from Peoria and Pekin over the lines of complainants to Chicago, Joliet, or Dwight, destined to points in eastern trunk-line and New England territories east of Buffalo, are not un-

(R. 50), after reciting the Commission's findings on rehearing, vacated and set aside the previous order of Division 5, and required that the defendants accord the Alton the increased divisions of the nontransit rates specified in the findings. The order contains no other requirement whatsoever.

**Proceedings in Court below**

Petition to set aside, enjoin, and restrain the Commission's order of December 7, 1931, "in so far as it is herein complained of as being illegal," was filed in the court below January 16, 1932. It named as defendants the United States and the Commission and certain of the eastern lines that had been defendants in the Commission proceeding. It prayed that the part of the Commission's order complained against be annulled and its enforcement enjoined, and also that the railroad defendants "be perpetually enjoined from enforcing or

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just, unreasonable, or otherwise unlawful as alleged by complainants:

"*It is ordered*, That the aforementioned original order of November 28, 1930, be, and it is hereby, vacated and set aside.

"*It is further ordered*, That the above-named defendants, according as they participate in the transportation, be, and they are hereby notified and required to cease and desist, on or before January 16, 1932, and thereafter to abstain from demanding, collecting, or receiving divisions of the joint nontransit rates specified in the preceding paragraph which do not allow said complainants the divisions found in said reports to be just, reasonable, and equitable.

"*And it is further ordered*, That this order shall continue in force until the further order of the commission."

applying as against petitioner the divisions of said joint transit rates approved, authorized, and required by said Commission in its said report and order of December 7, 1931." (R. 12.)

The petition also alleged (R. 9) that the divisions accorded the Alton by the defendant carriers were unlawful because changed subsequently to February 29, 1920, in alleged violation of Section 208 (b), Transportation Act, 1920, c. 91, 41 Stat. 456, 464, but at the hearing counsel for petitioner asserted that he did not ask an injunction under that section (R. 172).

Answers to the petition were filed by the United States (R. 56), by the Commission (R. 63), and by the railroad defendants (R. 73) each of which urged the lack of jurisdiction (R. 56–58; 72–73; 78–79). Hearing before three judges was had February 24, 1932 (R. 80), at which a certified copy of the record before the Commission was received in evidence as petitioner's Exhibit 1 (R. 80). A condensed statement of the oral testimony is reproduced in the transcript. (R. 81–172.) The exhibits received in evidence in the Commission proceeding, designated Exhibits 1 to 33, both inclusive, are not printed as part of the transcript but have been submitted to this court as original exhibits under stipulation of counsel (R. 193) and order of the District Court (R. 191).

April 7, 1932, the court rendered its opinion (R. 177–184) with which were its findings of fact (R. 173–176) and conclusions of law (R. 176–177). Its

opinion holds that the Commission's order does not authorize or permit the divisions complained of (R. 183), fails to command the carrier to do or refrain from doing anything, does not grant or withhold any authority or privilege, and does not abridge any power or facility (R. 184); that the Commission in fact entered no order, but merely declined to legislate (R. 180); that to exercise jurisdiction would amount to the determination of questions within the legislative and administrative jurisdiction of the Commission which the court was not free to consider; and that the bill should be dismissed for want of jurisdiction. (R. 184.) In its conclusions of law it found, among other things, that "there is no ground for, and the court is without jurisdiction to issue, an injunction against the eastern railroads, defendants herein, restraining them from continuing the present divisions of the transit rates." (R. 177.)

Final decree dismissing the petition for want of jurisdiction was entered April 22, 1932. (R. 184.) From the decree direct appeal to this court was taken. (R. 189.)

## SUMMARY OF ARGUMENT

I. The Commission's order granted part of the relief sought by requiring increases in the Alton's divisions of the joint nontransit rates. The Alton does not seek to set aside this, the only affirmative part of the order. The Commission denied relief in respect of the divisions of the transit rates, mak-

ing no order in respect of them. The Alton's bill does not actually seek to set aside or enjoin any part of the Commission's order, but merely complains because of the denial of the affirmative administrative relief which it asked in respect of the divisions of the transit rates. The order, negative in form and substance, in so far as complained of, is one which, under the view consistently adhered to by this court, is not within the jurisdiction of the District Courts to review. *Procter & Gamble Co.* v. *United States,* 225 U. S. 282; *Hooker* v. *Knapp,* 225 U. S. 302; *Lehigh Valley R. R.* v. *United States,* 243 U. S. 412; *Manufacturers Ry. Co.* v. *United States,* 246 U. S. 457, 482–483; *Piedmont & Northern Ry.* v. *United States,* 280 U. S. 469; *Standard Oil Co.* v. *United States,* 283 U. S. 235. Compare *Keller* v. *Pot. El. Power Co.,* 261 U. S. 428; *Radio Comm.* v. *General Electric Co.,* 281 U. S. 464, 469–470.

II. If the District Court had jurisdiction, appellant's petition should be dismissed for want of equity. At the time of the original order of Division 5, the Alton was in the hands of receivers. The report of Division 5 indicates it took that fact into consideration in making its order. At the time of the rehearing the receivership had ended, control of the Alton had been acquired by the Baltimore & Ohio, and it was not urged that increased divisions should be allowed on the ground that the Alton was in a weak financial condition.

The Commission was unable to find from the record before it that the transportation services of

the Alton for the performance of which it sought increased divisions, namely, transportation of grain, grain products, or grain by-products from Peoria to three particular junctions with the eastern carriers, is of importance to the public. This is an element which Section 15 (6) of the Act requires the Commission to consider in passing upon applications for increases in divisions of joint rates. The Alton has other junctions with the eastern carriers through which the haul of the Alton is shorter and through which the routes to the eastern destinations are shorter. The Commission found that on most of the traffic under consideration the route employed by the Alton is circuitous; that it is not necessary for this traffic after it reaches the Alton to move via its northern junctions; that the same joint rates apply via the more southerly junctions and that all of the traffic may now move through Ashland and Springfield, Ill., in connection with the Baltimore & Ohio. There are direct lines extending eastward to the destination territory over which this traffic can move.

An increase in the Alton's division for its haul from Peoria to Chicago would result in the Alton receiving greater revenue on shipments from points on the Alton, such as Kansas City, to Chicago, accorded transit at Peoria, than the Alton would receive on a like shipment moved direct to Chicago. The rates and divisions of rates over all other lines is the same as over the Alton. On traffic moving over any western line to Chicago destined to a point

in eastern territory, the line west of Chicago receives and retains its own rate to Chicago and the eastern line receives and retains its rate from Chicago to destination. The Alton in effect requested that the Commission compel the eastern lines to make a special concession to the Alton when it handled the traffic into Chicago by accepting less in the case of traffic interchanged with the Alton than on traffic interchanged with any other line. The Commission found that there was no transportation reason why they should accept less in the one instance than in the other.

The proportional rates from Peoria on two of the commodities involved, grain and grain by-products, on traffic originating in the Northwest, are now restricted so as not to apply over the Alton via Chicago or any junctions north of Chenoa, Ill. In view of the circuity of the route through Peoria on traffic originating in the Northwest the Commission suggested that the same restriction could readily be made on the third commodity involved, grain products. The Commission did not hold that the Alton must participate in this traffic via its northern junctions at a zero division, but, on the contrary, it declined to grant the Alton a division which would enable it to participate in the traffic via those junctions, suggesting that the same rate restriction against those junctions be extended to grain products.

The Commission's refusal to grant the Alton's request for increased divisions did not deprive it

of any statutory or constitutional right. Its right to a just and reasonable division stands on the same footing as the right of a shipper to a just and reasonable rate, both depending upon the administrative determination of the Commission.

It seems clear that the changes made in the divisions in question since the enactment of Transportation Act, 1920, were made "by mutual agreement between the interested carriers" within the meaning of Section 208 (b) of that Act. In any event the question whether these divisions were changed in alleged violation of that section seems wholly irrelevant, since the Commission is without authority to prescribe new divisions on the ground that those in effect were promulgated in alleged violation of that section.

The Alton is voluntarily a party to the joint rates in question and it is open to it to cancel the application of these rates via the particular junctions in question. Its divisions via other junctions are presumably reasonable. The Alton seeks to obtain a long haul on this traffic by transporting it to its northern junctions and exact a division from the eastern line which will shrink the latter's revenue below the amount which it obtains when the traffic is delivered to it by any other western carrier. The Commission was not compelled to grant the Alton increased divisions via these junctions and could not consider the Alton's revenues and interests alone but was bound to give consideration to the other matters which Section 15 (6) of the Act re-

quires that the Commission shall consider. *Brimstone R. R. Co.* v. *United States,* 276 U. S. 104, 114, 117; *B. & O. R. R.* v. *United States,* 277 U. S. 291, 300–301; *U. S.* v. *Abilene & So. Ry. Co.,* 265 U. S. 274, 284; *New England Divisions Case,* 261 U. S. 184, 193–194; *Beaumont, S. L. & W. Ry.* v. *U. S.,* 282 U. S. 74, 82; *Baltimore & Ohio R. R.* v. *United States,* 43 Fed. (2) 205. The action of the Commission in declining to grant the Alton increased divisions does not confiscate its property.

## ARGUMENT

### I

**The Commission's order denying the affirmative relief sought in respect of the divisions of the transit rates was a negative order which the District Court had no jurisdiction to review**

The Alton's complaint sought increased divisions of both the joint transit and joint nontransit rates. The Commission found that the nontransit rate divisions were unreasonable and by its order required that they be increased. The Alton has no complaint in respect of this, the only affirmative requirement of the order, and does not seek to have this requirement set aside. The Commission further found that the transit rate divisions were not unreasonable or otherwise unlawful and declined to grant the Alton relief in regard to them. The Alton's complaint is in respect of the denial of the affirmative relief sought in respect of these latter divisions.

Prior to the 1906 amendment of the Act to regulate commerce (c. 3591, 34 Stat. 584, 590), authorizing the Commission to establish through routes and joint rates, all joint rates were (as most still are) the result of agreements between carriers, which fix also the division or share of the joint rate to be received by each. *St. Louis S. W. Ry. Co.* v. *United States,* 245 U. S. 136, 139, note 2. The authority of the Commission over divisions of joint rates was strengthened by Transportation Act, 1920, amending section 15 (6) of the Interstate Commerce Act, but even that Act left the carriers free to establish, in the first instance, joint rates and the divisions of joint rates. The joint rates in question were not prescribed by the Commission, but were established by the carriers, and were joined in voluntarily by the Alton. The divisions of them were also fixed by the carriers. The eastern lines, not dependent upon the Alton for the traffic, were unwilling to accord the Alton the larger divisions that it demanded, and the Alton appealed to the Commission for relief.

The Commission, in the exercise of its administrative judgment, declined to grant that relief. The Commission did not fix the divisions complained of, it merely declined to order them to be changed. Its order merely had the effect of dismissing the Alton's complaint. It contains no requirement, command, or direction whatsoever in respect of the divisions in question. It does not approve, authorize, or require those divisions, does

not order the Alton or its connecting carriers to abide by the previously maintained divisions, does not direct the future maintenance of the existing divisions. It is negative both in form and in substance, amounting merely to a refusal by the Commission to grant the affirmative administrative relief sought.

Under the view consistently adhered to by this court, such an order is not within the jurisdiction of the District Courts to review. *Procter & Gamble Co.* v. *United States,* 225 U. S. 282; *Hooker* v. *Knapp,* 225 U. S. 302; *Lehigh Valley R. R.* v. *United States,* 243 U. S. 412; *Manufacturers Ry. Co.* v. *United States,* 246 U. S. 457, 482–483; *Piedmont & Northern Ry.* v. *United States,* 280 U. S. 469; *Standard Oil Co.* v. *United States,* 283 U. S. 235. Compare *Keller* v. *Pot. El. Power Co.,* 261 U. S. 428; *Radio Comm.* v. *General Electric Co.,* 281 U. S. 464, 469–470.

The Urgent Deficiencies Act, c. 32, 38 Stat. 208, 219, under which this suit was brought, abolished the Commerce Court and transferred its jurisdiction to the several District Courts of the United States. The provisions conferring jurisdiction are found in c. 309, 36 Stat. 539, U. S. C., Title 28, sec. 41 (27) (28), and include the following cases:

> First. All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order

of the Interstate Commerce Commission other than for the payment of money.

Second. Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

In the *Procter & Gamble* case a bill was filed in the Commerce Court to set aside the Commission's order dismissing the complaint which alleged the unreasonableness of the railroads' rule for demurrage charges upon the complainant's privately owned cars while standing upon its privately owned tracks. The bill charged that the dismissal order was void and beyond the Commisison's power, in that it sustained the validity of the demurrage rule complained of, and that the charges exacted under the rule permitted the railroads to take complainant's property without compensation and deprive it of its property without due process of law. The bill prayed that the order be annulled and that the railroads be enjoined from collecting demurrage under the rule. (The similarity of the bill here is noteworthy.) The Commerce Court overruled motions to dismiss for want of jurisdiction, and, after consideration of the merits, dismissed the bill for want of equity. Upon appeal, this Court held that the Commerce Court was without jurisdiction, basing its decision upon two principal grounds, which may be briefly stated as follows:

1. The second class of cases over which the Commerce Court was given jurisdiction embraced only

complaints as to affirmative orders of the Commission, that is to say, the second subdivision of the statute gave the court the right to take cognizance when properly made of complaints concerning the legality of Commission orders and conferred power to relieve parties, in whole or in part, from the duty of obedience to affirmative orders which are found to be illegal and which were of such a nature that the court could enforce them under the jurisdiction conferred by the first subdivision of the statute.

2. To construe the statute as giving the Commerce Court the power to review negative orders of the Commission would necessarily imply the duty to exercise as an original matter the administrative functions of the Commission and would virtually overthrow the entire system of regulation which had arisen from the adoption and enforcement of the Act to regulate commerce, by destroying the necessity for the prerequisite action of the Commission, amounting of necessity to a substitution of the court for the Commission or at all events creating a divided authority on a matter where from the beginning primary singleness of action and unity was deemed to be imperative, and bringing about the contradiction and confusion which it had been the inflexible purpose of the lawmaker from the beginning to guard against. Compare *Great Northern Ry.* v. *Merchants Elev. Co.*, 259 U. S. 285, and cases cited.

*Hooker* v. *Knapp,* 225 U. S. 302, followed the *Procter & Gamble* decision, and established that the court is without jurisdiction to issue a mandatory injunction against the Commission, where it has issued a negative order, requiring it to reopen a case and grant the affirmative administrative relief which it has denied.

In *Lehigh Valley R. R.* v. *United States,* 243 U. S. 412, the court said that "there is nothing for a court of equity to enjoin if all that the Commission has done is to decline to extend the time during which the railroad can keep its boat line without risk." The carrier asked certain affirmative relief from the Commission, that is, permission to keep its boat line without risk of prosecution for violation of the Panama Canal Act. The Commission declined to grant that relief. The present case seems essentially similar.

In *Manufacturers Ry. Co.* v. *United States,* 246 U. S. 457, 482–483, as here, the real cause of complaint was the failure of the Commission to fix divisions of joint rates: "Recognizing the Railway as a common carrier to which allowances and divisions might be accorded by the trunk lines, and that through routes were in operation between the Railway and those lines, it fixed the maximum joint rates and went no further for the present. The real ground for resorting to the courts in this case is the failure to fix divisions." The conclusion of the court was stated as follows:

> In effect the District Court was asked to perform a function specifically conferred by law upon the Commission. But that court has only the same jurisdiction that formerly was vested in the Commerce Court (Act of June 18, 1910, c. 309, 36 Stat. 539; Act of October 22, 1913, c. 32, 38 Stat. 208, 219); and it is settled that this does not permit the court to exercise administrative authority where the Commission has failed or refused to exercise it, or to annul orders of the Commission not amounting to an affirmative exercise of its powers. *Procter & Gamble Co.* v. *United States,* 225 U. S. 282, 292, *et seq.* (*Ibid.,* 483.)

It seems obvious that the same principle applies in the case at bar. Here the Alton asked the Commission to exercise its administrative function by fixing new divisions, but the Commission refused to do so.

In *Piedmont & Northern Ry.* v. *United States,* 280 U. S. 469, the District Court entered a decree dismissing the bill on the merits. On appeal this court reversed the decree on the ground that the bill should have been dismissed for want of jurisdiction instead of on the merits, holding that the order denying the certificate, being negative in substance as well as in form, infringed no right of the railway, citing *Procter & Gamble Co.* v. *United States, supra, Lehigh Valley Railroad Co.* v. *United States, supra, United States* v. *New River Co.,* 265 U. S. 533.

In the recently decided *Standard Oil case,* 283 U. S. 235, complaint was filed with the Commission for recovery of alleged overcharges. The Commission, upon interpretation of the complicated tariffs involved, found there were no overcharges and dismissed the complaint. In the opinion of this Court, which affirmed the decree of the District Court dismissing the bill to enjoin the negative order for want of jurisdiction, it was said that the question of jurisdiction depended upon the correct interpretation and application of the second subdivision of the statute conferring jurisdiction, quoted above, and that

> necessarily the District Court was without jurisdiction under the *settled construction* (italics ours) of that provision by which the authority of the court is limited to the review of affirmative orders, with "power to relieve parties in whole or in part from the duty of obedience to orders which are found to be illegal."[1]

The order in the present case, in so far as complained of, not being an affirmative order, is incapable of enforcement under the first subdivision of the statute conferring jurisdiction, and, since it

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[1] Citing *Procter & Gamble* v. *United States*, 225 U. S. 282, 292–293; *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 483; and *Piedmont & Nor. Ry Co.* v. *United States*, 280 U. S. 469, 477. See also *Great Northern Ry.* v. *United States*, 277 U. S. 172; *United States* v. *Illinois Central R. R. Co.*, 244 U. S. 82; *Delaware & Hudson Co.* v. *United States*, 266 U. S. 438; *United States* v. *Los Angeles & Salt Lake R. R. Co.*, 273 U. S. 299.

makes no requirement and contains no word of command, it is obviously one from the duty of obedience to which no party could be relieved.

*Intermountain Rate Cases,* 234 U. S. 476, *Chicago Junction case,* 264 U. S. 258, and *United States* v. *New River Company,* 265 U. S. 533, cited by appellant, do not modify the settled construction of the statute. The order reviewed in the *Intermountain Rate cases* was not a negative order. It divided the United States into five zones and specified the extent to which the transcontinental carriers could be relieved from the operation of the long-and-short haul clause of the fourth section of the Act on traffic to Pacific Coast points from each of the five zones. In the *Chicago Junction case* it was held that permissive orders, such as there involved, are reviewable, and in that case the court, referring to the *Procter & Gamble, Hooker* v. *Knapp,* and *Lehigh Valley cases,* stated that judicial review was refused in those cases not merely because in each the order was negative in character but because each was a denial of the affirmative relief sought. In the *New River case* the order was negative in form though affirmative in substance and judicial review was held permissible because the Commission's order granted affirmative relief sought. It is submitted that the order in the case at bar is negative in both form and substance, because it made no change in the existing status and is an order which, like the orders held not reviewable in the *Procter &*

*Gamble, Hooker* v. *Knapp, Lehigh Valley,* and *Manufacturers Ry. cases,* merely constituted a denial of the affirmative relief sought.

An injunction restraining the eastern carriers from applying the present divisions would not have the effect of restoring any previously existing divisions or putting into effect any other divisions. A change in the present divisions could be required only by the exercise of administrative functions.

Appellant seeks to distinguish the *Piedmont & Northern case* on the ground that it has a legal right to just and reasonable divisions and that the divisions against which it complained are unjust and unreasonable on their face. But Congress in delegating the legislative power to the Commission to precribe what in its judgment are just and reasonable divisions for the future required that the Commission consider a number of matters and when the Commission, after considering those matters, has declined to order changes in divisions, an appeal to the courts which urges that the divisions that the Commission has declined to change are unjust and unreasonable, but invites the court to exercise administrative functions and brings the case within the teeth of the consistent holding of the court that the statute conferring jurisdiction does not permit the court to exercise administrative authority or to annul orders of the Commission not amounting to an affirmative exercise of its powers.

The opinion of the court below held that this case can not be distinguished from the decision in the

*Procter & Gamble case,* and, after reviewing the cases above cited and others, referred to the following matters:

The division of freight rates is left as a matter of contract to the carriers in the first instance. There is no requirement in the Act that divisions must be filed with the Commission or that anything shall be done to make such divisions official acts of the Commission or that official endorsement of same be made. While joint rates must be filed with the Commission, divisions of joint rates, in the absence of Commission requirement, are not so filed but are left to and fixed by the carriers themselves. The Interstate Commerce Act (Section 15 (6)) gives the Commission jurisdiction, upon complaint of an aggrieved party or upon its own motion, to prescribe divisions to take the place of those fixed by the carriers.

When, in pursuance of constitutional power so to do, Congress creates a body such as the Interstate Commerce Commission and grants it power to regulate commerce and fix divisions of joint rates, it places such power within the custody of a body representative of the legislative branch of the government. The power to fix rates or to make divisions of rates is lodged in the legislative branch of the government. *Term. R. R. Assn.* v. *United States,* 266 U. S. 17, 30–31; *Keller* v. *Potomac Elec. Power Co.,* 261 U. S. 428, 440; *Ohio Valley Co.* v. *Ben Avon Borough,* 253 U. S. 287, 289; *L. & N. R. R. Co.* v. *Garrett,* 231 U. S. 298, 305; *Interstate*

*Commerce Com.* v. *Humboldt S. S. Co.,* 224 U. S. 474, 483; *Prentis* v. *Atlantic Coast Line Co.,* 211 U. S. 210, 226. Clearly, there must be some administrative order upon divisions, in pursuance of the Commission's legislative power, before it can be said that legislation has occurred. In the present case the Alton, dissatisfied with divisions forced upon it by its connecting carriers which afford it only an alleged confiscatory return or none at all, and finding itself unable to agree with its joint associates as to any modified divisions of joint rates, made its appeal that the Commission exercise its legislative power, find the existing divisions unfair, and fix fair ones.

After an examination of the facts, the Commission found that the divisions were not unfair and dismissed the complaint. It entered no other order, it merely declined to legislate. It did not order the Alton or its connecting carriers to abide by the previously maintained divisions, it did not direct the future maintenance of the existing divisions; its action was equivalent to saying that it did not find the situation such that it should fix divisions; that is, it found no reason to exercise its legislative administrative power. The court then held:

> We are now asked to enjoin this order of dismissal. Petitioner appeals to us for a decree against a legislative body enjoining its refusal to enact legislation. Such relief is beyond judicial discretion. The judiciary

may not by mandatory injunction force a legislative or administrative branch of the government to exercise its legislative power. Refusal to legislate to prevent confiscation is subject matter over which a judiciary has no jurisdiction.

Suppose the act creating and granting jurisdiction to the Interstate Commerce Commission had never been enacted and consequently the power so to legislate as to fix divisions of rates remained solely in Congress. Then suppose, in the absence of such legislation, petitioner had applied to Congress for legislation fixing new divisions upon the plea that those heretofore enforced by its associate joint carriers are confiscatory. Could it be successfully contended that the judiciary might by any decree interfere with the action of Congress in failing to legislate? It is obvious that the courts would have no such power. "Litigation can not arise until the moment of legislation has past" (*Prentis* v. *At. C. L. Co.*, 211 U. S. 210 at 227). A corollary to this sentence from Mr. Justice Holmes is that litigation is powerless to compel legislation. (R. 180.)

We submit that this holding of the court below is sound. It is in accord with numerous decisions of this Court such as *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 227; *Terminal R. R. Assn.* v. *United States*, 266 U. S. 17, 30–31; *Keller* v. *Potomac Electric Power Co.*, 261 U. S. 428, 440, and the very recent expressions in *Radio Comm.* v.

*General Electric Co.*, 281 U. S. 464, 469–470, and *Arizona Grocery Co.* v. *Atch. Ry.*, 284 U. S. 370, 386, which emphasize the legislative character of rate making and rule making for the future by administrative bodies created by Congress to act for it in the regulation of interstate commerce within the scope of the powers delegated.

The court below properly dismissed the bill *for want of jurisdiction.*

## II

**If the District Court had jurisdiction, appellant's petition should be dismissed for want of equity**

In the event the court overrules the holding below that the Commission's order, in so far as complained of, is negative in form and substance and therefore not subject to judicial review, and considers the case on the merits, then we submit that the appellant's petition should be dismissed for want of equity.

Under Section 15 (6) of the Interstate Commerce Act, as interpreted by this court in such decisions as the *New England Divisions case*, 261 U. S. 184, and the *Orient Divisions case* (*United States* v. *Abilene & Southern Ry.*), 265 U. S. 274, it is within the power of the Commission, in the public interest, to take into consideration the financial needs of a weak road and give it a division larger than justice merely as between the respective carriers would suggest, in order to maintain it in effective operation as part of an adequate

transportation system, provided the share left to its connections is adequate to avoid a confiscatory result. At the time of the filing of the complaint and the order of Division 5, the Alton was in the hands of receivers. The report of Division 5 indicates that it took this fact into consideration in making its order:

> Any divisions of these joint rates which we have power to prescribe will aid the Alton only toward attaining the amount of revenue required to pay its operating expenses and taxes. A fair return on the Alton's railway property held for and used in this service of transportation is brought in question here only to the extent that fair divisions of the rates on these commodities may contribute thereto. The Alton is in the hands of receivers. We may take this into consideration, but we may not base our conclusions wholly thereon. *United States* v. *Abilene & S. R. Co.,* 265 U. S. 274; *New England Divisions Case,* 261 U. S. 184. (R. 30.)

Prior to the rehearing, the changes in the status of the Alton hereinbefore related had taken place. The Alton Railroad Company had been formed, had acquired and was operating the lines of railroad formerly constituting the Chicago & Alton Railroad System, and the Baltimore & Ohio Railroad Company had in turn acquired control of the Alton. (R. 42, 173.) These changes were urged in the petition of the eastern carriers as a ground for rehearing. (R. 153.) In the report of the

Commission on rehearing these additional "facts of importance" were noted (R. 42) and it is evident from the report as a whole that the Alton, as thus controlled by the Baltimore & Ohio (one of the defendants), did not urge increased divisions on the ground that it was in a weak financial condition.

Even where a carrier is weak, the Commission must consider whether its transportation services are important to the public. In its report the Commission related certain facts which, it said, "are important in our consideration of 'the importance to the public of the transportation services' of the Alton for the performance of which it is here seeking increased divisions, an element which Section 15 (6) of the Act requires us to consider." The Commission further said (R. 48) that "no shipper or community has expressed any concern over the continuance of those transportation services by the Alton, and

> this record affords no support for a finding that they are important to the public."

The Commission pointed out in its report that on most of the traffic here considered the route employed by the Alton is circuitous; that the proportional rates from Peoria apply in connection with the Alton, not only via Chicago, Joliet, and Dwight [1]

[1] This is subject to the qualification that the rates on grain and by-products of grain originating in Northwestern territory do not apply via these junctions or via any junctions north of Chenoa.

but also via junctions south of Dwight, such as Chenoa, Ill., to which the haul of the Alton is considerably shorter than to Dwight, and it is not necessary for this traffic after it reaches the Alton to move via its northern junctions and that all of this traffic may now move through Ashland and Springfield, Ill., in connection with the Baltimore & Ohio. (R. 47–48.)

Further, it is obviously not of importance to the Peoria shippers, shipping traffic from Peoria to points in the east over the Alton as initial carrier, that the Alton should interchange the traffic with the eastern lines at particular junctions when it has other junctions via which the distances are as short, if not shorter, and through which the traffic can move at the same rates. Frequently the transportation services of a carrier are found to be of public importance to a particular community when it is the only railroad serving that community. This is not true of the Alton in so far as the Peoria-Pekin district is concerned. The shippers of the traffic in question are actually served by the rails of the Peoria & Pekin Union Railway, a switching or belt line which connects with all the carriers reaching the Peoria-Pekin district. (R. 99–100; see also 93 I. C. C. 3; 115 I. C. C. 470.) There are numerous other lines than the Alton over which the traffic can be shipped. Among these are the Rock Island and the Burlington, which, like the Alton, operate lines from Peoria to Chicago. (R. 44–45.) Three trunk-line carriers operating lines from Chicago to

the eastern territory also reach and serve Peoria, namely, the Pennsylvania, the New York Central (Big 4) and the New York, Chicago & St. Louis (Nickel Plate). (Exhibit 23, a large map depicting the various railroads involved and showing the routes and junction points.)

These three lines are thus in a position to handle the traffic over their own rails the entire distance from Peoria to the eastern destinations which they also reach, without dividing the rate with any other line. Being thus in a position to handle the traffic themselves, they are unwilling to accept a division of the Peoria proportional rates less than their Chicago proportional rate in order to allow the Alton to take the traffic in competition with them at Peoria, haul it to Chicago, and there deliver it to them. The Toledo, Peoria & Western also has a direct line extending eastward from Peoria and with connections forms another through route to the east over which this traffic may move from Peoria. As previously stated, the rates over all these other lines and their connections to any given destination in eastern territory is the same as over the route formed by the Alton as the initial carrier. (Cf. *Grain Rates in Central Freight Association Territory,* 28 I. C. C. 549, 558; *Low Moor Iron Co.* v. *C. & O. Ry.,* 42 I. C. C. 221, 227; *Board of Trade* v. *N. & W. Ry.,* 26 I. C. C. 146, 150; *Star Grain & Lumber Co.* v. *A., T. & S. F. Ry.,* 14 I. C. C. 364, 370.)

In *Chicago & Alton R. R. Co.* v. *T., P. & W. Ry. Co.,* 146 I. C. C. 171, cited by appellant at page 62 of its brief, the Commission found that public interest required continued operation of freight trains of the Alton under trackage rights over the Toledo, Peoria & Western Railway between Washington, Ill., and Peoria, Ill. This finding is not contrary to the Commission's finding in the case at bar that this record affords no support for a finding that the transportation services of the Alton for the performance of which it here sought increased divisions are important to the public. Inasmuch as this case related only to divisions of particular joint rates on grain and its products when moving via certain junctions, the question of the importance to the public of the transportation services generally of the Alton was not in issue, but only the importance to the public of the transportation services of the Alton for the performance of which it sought increased divisions, namely, transportation from Peoria to three particular junctions with the eastern carriers.

As pointed out in the Commission's report, an increase in the Alton's division for its haul from Peoria to Chicago would result in the Alton receiving greater revenue on a shipment from Kansas City, for example, to Chicago accorded transit at Peoria than it would receive on a like shipment moved direct to Chicago. (R. 47.) The Alton's rate from Kansas City to Chicago is 16

cents. (Ex. 24.) Its rate from Kansas City to Peoria is 14 cents (R. 137) and its present division from Peoria to Chicago (on traffic originating at Kansas City, which is in Trans-Mississippi territory) is 2 cents, resulting in a total compensation of 16 cents, or the same as its own published rate from Kansas City to Chicago. It may be suggested that the Alton should have greater revenue on the shipment accorded transit than on the direct shipment, but if this is so, then the additional revenue should come from a separate charge for the transit, rather than out of the eastern line's revenue. In the Commission proceeding the Alton asked that its divisions be increased to 20 per cent of the rate. If this had been granted, it would have increased the Alton's division of 2 cents to 6.5 cents (20 per cent of 32.5 cents), and would have altered the revenues of the respective carriers as follows: On a shipment from Kansas City to New York, transited at Peoria, it would have increased the Alton's revenue from 16 cents to 20.5 cents (Alton's rate of 14 cents to Peoria plus its division of the Peoria-New York rate of 6.5 cents) which is 4.5 cents greater than its rate to Chicago, and it would have reduced the revenue of the eastern line from 30.5 cents to 26 cents, which latter amount is 4.5 cents less than its Chicago-New York rate. At the same time, the revenue of the eastern line for its haul from Chicago to New York, on traffic reaching its rails over any other western line than the Alton would remain at 30.5 cents.

The situation is the same on all other railroads. For example, on a shipment transported by the Chicago, Rock Island & Pacific Railway from Goodland, Kans., a local point on its line in Trans-Mississippi territory, to Peoria and after transit there shipped out over the Rock Island to Chicago, thence an eastern line to destination, the Rock Island receives and retains for its haul from Goodland to Peoria its local rate of 32.5 cents and for its haul from Peoria to Chicago its 2-cent division, or a total compensation of 34.5 cents, which is the same as its rate from Goodland to Chicago. (Ex. 24.) The eastern line would receive, if the destination were New York, an amount equivalent to its Chicago-New York rate of 30.5 cents. If the outbound shipment hauled by the Rock Island from Peoria had originated upon or had been transported to Peoria by another line, then the Rock Island's total compensation would have been its 2-cent division, the same as the Alton receives in all cases where the traffic reaches Peoria over the rails of a line other than the Alton. As stated in the Commission's report—

> The Chicago, Rock Island & Pacific Railway Company and the Chicago, Burlington & Quincy Railroad Company also serve Peoria and have their own rails between Kansas City, Mo., and Chicago, as does the Alton. The rate situation on this traffic and the divisions of the applicable rates are the same over the routes of these lines as

they are over the route of the Alton, but only the latter is complaining. R. 44–45.)

The 16-cent rate from Kansas City to Chicago applies not only over the Alton but over all other railroads between those points, including the Rock Island, the Burlington and the Santa Fe. On traffic moving over any of these lines to Chicago, destined to a point in eastern territory, the line west of Chicago receives and retains its own rate to Chicago and the eastern line receives and retains its rate from Chicago to destination. On a shipment from Kansas City to New York, for example, moving over the Santa Fe to Chicago, thence New York Central, the Santa Fe's revenue is its rate of 16 cents to Chicago, and the New York Central receives as its revenue its rate of 30.5 cents. These rates would be applicable whether the shipment moved through in continuous transportation or whether it was stopped at Chicago or at any intermediate point west of Chicago for transit.

On traffic originating in any of the western origin territories and reaching the rails of the eastern carrier at Chicago over any other line than the Alton, the eastern line receives and retains its Chicago-to-destination rate without being called upon to divide it with any other line.

In its complaint the Alton did not ask that the Commission require the eastern lines to shrink their revenues on traffic delivered to them at Chicago by

any of the other western lines, but in effect requested that the Commission compel the eastern lines to make a special concession to the Alton when it handled the traffic to Chicago, by accepting less in the case of traffic interchanged with the Alton than on traffic interchanged with any other line. The eastern lines were unwilling to do this, and the Commission found that there was no transportation reason why they should accept less in the one instance than in the other.

Inasmuch as the outbound proportional rates from Peoria are actually transit rates, they may not be considered standing alone, nor may the divisions thereof be considered by themselves, but both must be considered in the light of the fact that they apply on shipments to and from the transit point, which, though distinct in fact, are treated for transit purposes as continuous through shipments. (R. 45–47.)[1]

The lines of the Alton reach and serve Trans-Mississippi and Illinois-Iowa territories in part.

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[1]As stated in *Central R. R. Co.* v. *United States*, 257 U. S. 247, 257, the transit privilege, under which shippers are accorded a more favorable basis of rates than would obtain if the inbound and outbound movements to and from the transit point were treated as separate shipments, "rests upon the fiction that the incoming and the outgoing transportation services, which are in fact distinct, constitute a continuous shipment of the identical article from point of origin to final destination." Compare *United States* v. *L. & N. R. R. Co.*, 235 U. S. 314, 324–325; *A., T. & S. F. Ry.* v. *United States*, 279 U. S. 768.

Whenever the Alton obtains the inbound haul to Peoria as well as the outbound haul from Peoria to Chicago its total compensation (its rate to Peoria plus its division of 2 cents from Peoria to Chicago) is the same as its own published rate from point of origin to Chicago, as shown above.

The lines of the Alton do not, however, reach Northwestern territory and hence it is not in a position to obtain both the inbound and outbound hauls to and from Peoria on traffic originating in that territory. There are direct lines from that territory to Chicago, such as the Chicago & North Western, the Chicago, Burlington & Quincy, the Chicago, Milwaukee, St. Paul and Pacific, and the Minneapolis, St. Paul & Saulte Ste. Marie. The rate over all these lines from Minneapolis (a typical point in Northwestern territory) to Chicago and to Peoria is 11.5 cents. The rate from Chicago to New York is 30.5 cents and likewise the rate from Peoria, on traffic originating in Northwestern territory, is 30.5 cents. When the traffic is handled over a direct line from Minneapolis to Chicago that line collects its 11.5-cent rate and the eastern line receives its Chicago-New York rate of 30.5 cents. The eastern line was unwilling to shrink its rate in order to allow the Alton to participate in this traffic.

The Commission found that the route embracing the line of the Alton, under which the traffic would first move southbound to Peoria and then northbound over the Alton for a distance of 155 miles to Chicago, is circuitous. The Commission declined

to grant the Alton a division which would enable it to participate in this traffic via its northern junctions, pointing out that it is not necessary for this traffic to move through those junctions and that it can move through more southerly junctions at the same rates. (R. 47–48.) The record shows that the Alton has junctions at Bloomington, Ill., with the Cleveland, Cincinnati, Chicago & St. Louis, Illinois Central and New York, Chicago & St. Louis; at Atlanta, Ill., with the Pennsylvania Railroad; at Chenoa, Ill., with the Toledo, Peoria & Western; and at Springfield and Ashland, Ill., with the Baltimore & Ohio, which now controls the Alton. (Ex. 23.) The carriers themselves have recognized the circuity of the routes through the Alton's northern junctions. At the present time the proportional rates on grain and by-products from Peoria, on traffic originating in the Northwest, are restricted so as not to apply over the Alton via Chicago or any junctions north of Chenoa, Ill. (R. 48, 87, 89.) Formerly, the same restriction applied on grain products too, and the Commission said in its report that this restriction now "could readily be made" on grain products. (R. 48.)

Interchange of the traffic between the Alton and the eastern lines at junctions south of Chicago, Joliet, and Dwight will obviously tend to reduce the circuity of the route. And the Commission suggested that the application of the grain-products rates on Northwestern traffic be canceled via

the northern junctions. The Commission did not hold that he Alton must participate in this traffic via its northern junctions at a zero division, but on the contrary it declined to grant the Alton a division which would enable it to participate in the traffic via those particular junctions.

The situation as to traffic originating in Northern Iowa territory is practically the same as in the case of traffic originating in Northwestern territory, and what has been said respecting the latter territory applies with equal force to Northern Iowa territory.

In *Grain Rates in Central Freight Association territory,* 28 I. C. C. 549, involving rates on grain from Illinois to the east, the Commission said:

> Several lines of railroad run east and west through the state of Illinois and thence east to the Atlantic seaboard. These are the short lines from the territory traversed, and are called east and west lines. Several other lines of railroad extend north and south through the state of Illinois, converging upon Chicago, which are known as north and south lines. The north and south lines cross the east and west lines at numerous junction points.
>
> If grain at one of these junction points moves to the eastern market by the direct line, the north and south line obtains no part in the transportation. If grain at some point upon the north and south line were to move to the same market by the shortest line, the north and south line would ordinarily trans-

> port it a short distance to a junction point with some east and west line which would carry it from there to destination. In neither case would the north and south line obtain any considerable haul.
>
> At Chicago are found certain east and west lines which do not tap the state of Illinois to any considerable extent by their own rails and which, therefore, will not participate in the handling of this grain unless it is brought to Chicago by the north and south line. Chicago itself is the greatest grain market in the United States, and its merchants desire to handle this grain.
>
> Owing to these various competitive conditions it long ago came to pass that grain rates to eastern destinations from points in Illinois were the same through Chicago as by the direct line, even though the distance was materially greater. At Chicago certain transit privileges were allowed so that the grain could be merchandised at that point and sent on at the balance of the through rate. (*Ibid.*, 555–556.)

And at page 558 the Commission, after holding that the grain shipper of Illinois is entitled to a reasonable rate by the direct line, made the following statement in reference to divisions of the indirect line:

> If the line via Chicago can not obtain reasonable compensation when operating over the circuitous route, it can retire from the business.

The Commission's refusal to grant the Alton's request for increased divisions did not deprive it of any statutory or constitutional right. Its right to a just and reasonable division is not superior to the right of a shipper to a just and reasonable rate—both depend upon the administrative determination of the Commission. Compare *Sprunt & Son* v. *United States,* 281 U. S. 249, 255; *United States* v. *Merchants & Mfgrs. Traffic Assn.,* 242 U. S. 178, 188; *Edward Hines Trustees* v. *United States,* 263 U. S. 143, 147, 148; *Lehigh Valley case,* 243 U. S., *supra; Piedmont & Northern case,* 280 U. S., *supra.*

Appellant argues that the divisions in question were promulgated in violation of Section 208 (b) of Transportation Act, 1920, providing that—

> All divisions of joint rates, fares, or charges, which on February 29, 1920, are in effect between the lines of carriers subject to the Interstate Commerce Act, shall continue in force and effect until thereafter changed by mutual agreement between the interested carriers or by State or Federal authorities, respectively.

A similar provision in paragraph (a) of the same section provided for the continuance of all rates in force on the same date until changed according to law. These two provisions were amongst many others grouped under Title II relating to "Termination of Federal Control." Rates and divisions of rates during Federal control were

established by the Director General of Railroads, and the evident purpose of these provisions was to maintain their standing upon the return of the railroads to their owners, and no doubt had relation to the guaranty to carriers during the six-month period after Federal control provided for in section 209. Eight years later, or on July 1, 1928 (R. 85 and appellant's brief, page 5), the divisions against which the Alton complained were made effective. The record is not very clear as to what changes in these divisions, if any, were made during the period from the end of Federal control, February 29, 1920, to July 1, 1928. But it seems clear that these divisions were changed "by mutual agreement between the interested carriers" within the meaning of Section 208 (b), Transportation Act.

It is admitted they were not changed by State or Federal authorities, (appellant's brief, page 20) and since the appellant accepted and moved traffic at the new divisions under its voluntary participation in the joint rates via the junctions in question, without making any effort to cancel the application of its rates via those junctions, and without making complaint to the Commission respecting those divisions until June 21, 1929, or nearly a year after the divisions became effective, it must be assumed, at least for the purposes of said Section 208 (b), that it agreed to them. In any event, this question under Section 208 seems to be wholly irrelevant to

the validity of the Commission's action, since the Commission is without authority to prescribe new divisions on the ground that those in effect were promulgated in alleged violation of that section.

The appellant's contention that the Commission's disposition of the case had the result of leaving in effect the divisions complained of and of leaving the Alton in the position of being required to perform a transportation service under joint rates out of which it received divisions which are less than the cost of the service and that, therefore, its property is confiscated, overlooks the fact that the Alton is voluntarily a party to the joint rates in question. It is open to the Alton to cancel the application of these rates over its line, via the particular junctions in question. It will be remembered, too, that the Alton's complaint to the Commission did not put in issue the reasonableness of the Alton's divisions via all its junctions with the eastern carriers but only those applicable when the traffic moves through Chicago, Joliet, and Dwight. Since the Alton did not challenge the reasonableness of the divisions through those other junctions, it must be presumed that they are satisfactory to the Alton. The Alton seeks to obtain a long haul on this traffic, to turn the traffic over to an eastern line at its northern junctions for further transportation to destination, and to obtain a division from the eastern line which will shrink the latter's revenue below the amount which it obtains when

the traffic is delivered to it by any other western carrier.

The appellant's contention erroneously presupposes that the Alton has an adjudicated or vested right to participate in the transportation at the joint rates in question, to haul the traffic to certain junctions which it prefers, and to receive from the carriers connecting with it at those junctions a compensatory division at all events and regardless of the effect on their revenues; and further, that the Commission is bound to issue an affirmative order against the carriers connecting with the Alton at those junctions requiring them to accord increased divisions to the Alton upon consideration of the Alton's revenues and interests alone and without giving consideration to the other matters which the statute in section 15 (6) requires that the Commission shall consider in prescribing or determining the divisions of joint rates. *Brimstone R. R. Co.* v. *United States,* 276 U. S. 104, 114, 117; *B. & O. R. R.* v. *United States,* 277 U. S. 291, 300–301; *U. S.* v. *Abilene & So. Ry. Co.,* 265 U. S. 274, 284; *New England Divisions Case,* 261 U. S. 184, 193–194; *Beaumont, S L. & W. Ry.* v. *U. S.,* 282 U. S. 74, 82; *Baltimore & Ohio R. R.* v. *United States,* 43 F. (2d) 605 (affirmed, 284 U. S. 195, on other grounds).

The fact that there is no order or requirement of the Commission establishing the through routes over the Alton through the particular junctions in

question or prescribing or requiring the joint rates applicable over those through routes, that there is no order or requirement that the Alton continue its participation in the traffic through these particular junctions, and that the order in question contains no affirmative requirement and places the Alton under no compulsion whatever, precludes the possibility that the order could operate to confiscate the Alton's property. Action of a governmental body which has no scintilla of compulsion against the carrier can not have the effect of taking its property in contravention of the Constitution.

## CONCLUSION

It is respectfully submitted that the decree below should be affirmed.

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